U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: 8/7/01
CASE NO. 2000-INA-272

In the Matter of:

PETER CURZI
d/b/a P & C PLASTER
and/or P & C PLASTERING COMPANY, INC.,[1]
Employer

On Behalf of:

JOSE LUIS HUERTAS
a/k/a JOSE LUIS HUERTA,[2]
Alien

Appearance: Jean-Pierre Karnos, Esquire
For the Employer

Certifying Officer: Armando Quiroz
San Francisco, California

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

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[1]Peter Curzi signed the Application for Alien Employment Certification and other documents, as the owner of P & C Plaster (AF 14,15). Some documents list "Peter Curzi" as the Employer, while others indicate that "P & C Plaster" is the Employer for the purpose of this application (*Compare,* AF 1,3,5,11,12,13,15,19). Adding to the confusion is evidence that P & C Plaster is actually incorporated under the name of "P & C Plastering Company, Inc." (AF 23).

[2]The Alien's surname is listed on the application and most other documents as "Huertas" (AF 1,13,46, 55). However, the Alien's signature suggests that his actual surname is "Huerta" (AF 61). Furthermore, in the text of Employer's rebuttal (AF 7) and in Appellant's Brief, page 5, the Alien is also referred to as "Mr. Huerta."

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Jose Luis Huertas or Huerta ("Alien") filed by Peter Curzi, as owner of P & C Plaster (a/k/a P & C Plastering Company, Inc.) ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Office ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under §212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to is the Secretary of State and Attorney General that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On July 10, 1995, the Employer filed an application for labor certification to enable the Alien to fill the position of "Plasterer." The stated job duties for the position, as set forth on the application were as follows:

> Apply plaster to interior and exterior walls using hand tools and portable power tools. Apply plaster veneer over dry wall according to blueprints, or architect's drawings. Prepare and mix the plaster, troweling or spraying it onto the surface as needed. Prepare the finish coat, mixing all required elements. Use special tools, like hawks, trowels, brushes, and spray guns. Lay the metal lath or board lath as it is required.

(AF 13).

An eighth grade education, two years of experience in the job offered, and a resume or letter of qualifications were required. Employer's wage offer is $13.85 per hour for a 40-hour week (AF 13). This represents a slight increase from his initial suggested hourly wage offer of $12.50 (AF 13,15,50). The Alien supervises no employees, and he reports to the owner (AF 13).

On November 26, 1999, the CO issued a NOF proposing to deny certification (AF 8-10). The CO stated, in pertinent part:

> Finding: Your wage offer of $12.50 per hour is considered to be below the prevailing wage of $21.77. The State Job Service Alien Certification staff indicated to you, the employer, by notice dated 14 November 1995 that you wage offer is below the prevailing wage and you were given the opportunity to amend your wage offer. Instead you chose to partially raise the wage to $13.50 (sic) and rebut the wage finding. We have reviewed your rebuttal, dated December 18[3] which contests the wage finding by arguing you did your own survey of 12 employers but it is unsatisfactory for the following reasons:
>
> > the EDD determination is a Davis-Bacon Act [DBA] wage can only be rebutted by showing that the job described is one not covered by DBA.
>
> Corrective Action: A) To increase wage to prevailing and retest the labor market...
>
> B) To contest the wage finding:
>
> You must **document** that the wage is one not covered by DBA.

(AF 9).

On or about December 22, 1999, Employer sent its rebuttal (AF 5-7), contending that the Davis-Bacon Act is inapplicable to this case, since that Act applies exclusively to government contracts. In addition, the Employer stated, in pertinent part:

> Notwithstanding the likelihood that the Davis-Bacon Act is not applicable to this case, an independent survey of 12 plastering companies in the employer's area indicates that the average hourly wage for a plasterer with two years experience is $13.83 an hour. This survey was included in the employer's Application for Mr. Huerta before the EDD's Alien Certification Office.
>
> **CONCLUDING REMARKS**
> The Davis-Bacon Act prevailing wage of $21.77 an hour is almost $7.00 an hour

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[3] No reference is made to the year of this so-called "rebuttal,"and it is not apparent from the record (AF 9).

> higher than the highest listed hourly wage in the employer's independent survey. If the employer were to comply with the Davis-Bacon Act prevailing wage, it would be unable to compete with the other plasterers in the area. By requiring the employer to amend its wage offer to $21.77 an hour you are, in effect, using the Davis-Bacon Act as a pretextual device for the denying employer's Application for Alien Employment Certification of Mr. Huerta. This (is) far beyond the scope of what was intended by the Davis-Bacon Act.

(AF 7).

On February 25, 2000, the CO issued a Final Determination ("FD") denying certification (AF 3-4). The CO found that the Employer's rebuttal, stating:

> NOF indicated that your wage offer is less than the Davis-Bacon wage appropriate for this occupation. You rebut that the Davis-Bacon Act itself "controls."
>
> You do not explain what it "controls." Since you are seeking labor certification under the Immigration and Naturalization Act and applicable regulations, those would appear to be the ones who actually "control." As the NOF noted, you can only rebut a Davis-Bacon Act determination by showing the job is not covered under the Act; you have not done this.

(AF 4).

Discussion

The fact situation and arguments presented in this case are similar to those in *De La Garza Construction Co.*, 2000-INA-40 (Feb 23, 2001) and *Newport Trim Construction*, 2000-INA-215 (Dec. 18, 2000)(where the panel remanded the cases for further explanation, when the CO relied upon a prevailing wage of $23.80 under Davis-Bacon for the position of carpenter, but Employer questioned its applicability and cited another survey which showed a significantly lower prevailing wage rate). Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. *Our Lady of Guadalupe School*, 1988-INA-313 (1989); *Beltha Corp.*, 1988-INA-24 (1989) (*en banc*). On the other hand, where the FD does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not at issue before the Board. *Barbara Harris*, 1988-INA-32 (1989).

The only reason provided in the FD for the denial of labor certification was the alleged failure of Employer to offer the prevailing wage rate ($21.77 per hour), as provided under the Davis-Bacon Act. We find, however, that the CO misinterpreted the Employer's rebuttal argument in the FD. The Employer did *not* contend that "the Davis-Bacon Act itself 'controls,'" as represented in the FD (AF 4). To the contrary, the Employer was merely citing the CO's

position, as set forth in the NOF, when he stated: "Under the reference which you (the CO) cited 40 U.S.C. 276(a) [Davis-Bacon Act] controls." (AF 6). In fact, Employer contended in rebuttal "that the Davis-Bacon Act is inapplicable to the present case as no government contract is involved." (AF 6). Furthermore, the Employer stated, notwithstanding the likelihood that the Davis-Bacon Act is not applicable, it is clear from the disparity in the wages (*i.e.*, $21.77-Davis-Bacon Act; $13.83-Employer's Wage Survey of 12 plastering companies in the area), that the $21.77 wage rate is inflated (AF 7).

It appears from the somewhat limited evidence presented that plasterers are one of the occupations the Davis-Bacon Act is designed to protect (AF 20-21,24). The regulations in INA proceedings clearly state that the wage determinations made under the Davis-Bacon Act apply in all cases where the *occupation* of the job opportunity is involved. 20 C.F.R. §656.40(a)(1) (emphasis added). Therefore, whether a government contract is involved in this particular job opportunity is irrelevant. Accordingly, we reject Employer's initial argument that the prevailing wage determination under the Davis-Bacon Act is not applicable to labor certification cases, which do not involve government contracts.

Employer has also contended, however, that the prevailing wage for a plasterer under Davis-Bacon cited by the CO is not an accurate one for this job opportunity. Relying upon a "Survey done on 12 randomly selected plastering companies," Employer claims that a $13.83 hourly wage rate is appropriate, not the $21.77 per hour rate cited by the CO (AF 16; *Compare* AF 20-21).

Regarding wage determinations, the Board has held that although the initial burden of persuasion rests with Employer, such burden presumes the Employer knows the source and basis for the prevailing wage determination. Further, if the wage determination under Davis-Bacon is challenged in Rebuttal, the CO must provide a reasonable explanation of how the prevailing wage was determined from the schedule, and why it is appropriate under the circumstances. *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000)(*en banc*); *Order Granting Reconsideration and Affirming En Banc Decision* (July 28, 2000).

Here, the CO cited the Davis-Bacon Act as the source for the prevailing wage determination (AF 21). However, the basis for the $21.77 wage rate is largely unexplained. Based upon our review of the record, we find that the only "explanation" for the $21.77 wage rate is the following notation:

PLAS0775B 06/01/1993

SAN LUIS OBISPO COUNTY:	Rates	Fringes
PLASTERER	$21.77	

(AF 20).

We note that in other recent cases, the Davis-Bacon Act wage survey was not limited to one category or wage rate per geographical area. Thus, for example, the Davis-Bacon Act survey for Los Angeles area carpenters, listed a wage rate of $10.00 for "Experienced," non-union, carpenters, while the wage rate for union carpenters having "3 years with firm" was $23.80, and the hourly wage for "Experienced" union carpenters was $16.00. *See, e.g., De La Garza Construction Co.,* 2000-INA-40 (Feb 23, 2001) and *Newport Trim Construction*, 2000-INA-215 (Dec. 18, 2000). This suggests that the Davis-Bacon Act wage survey for "San Luis Obispo County plasterers" may not simply be the $21.77 rate cited (AF 20). The Davis-Bacon Act wage rate may also vary depending on the level of experience and union status of the plasterers.

In view of the disparity between the $21.77 wage rate cited by the CO under the Davis-Bacon Act survey and the $13.83 wage rate cited in Employer's survey; the fact that other occupations show varying wage rates under the Davis-Bacon Act based on years of experience and union status; and, Employer's questioning the wage rate relied upon by the CO; the limited information supplied by the CO is deemed insufficient. Without further explanation, the Board does not have adequate information to determine whether the prevailing wage rate made in this case was reasonable. Moreover, as stated above, the CO misconstrued the Employer's rebuttal argument. Under the circumstances, a remand for clarification is appropriate. Furthermore, on remand, the Employer is directed to clearly identify the name of the individual, company, or corporation applying for certification on behalf of the Alien, and specify the correct spelling of the Alien's surname.

ORDER

The Certifying Officer's denial of labor certification is hereby VACATED and this case is REMANDED for further proceedings consistent with the foregoing decision.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.